

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

No. 77-4182

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In the
United States Court of Appeals
For the Second Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

YESHIVA UNIVERSITY,

Respondent,

and

YESHIVA UNIVERSITY FACULTY ASSOCIATION,

Intervenor.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF THE
AMERICAN FEDERATION OF TEACHERS, AFL-CIO
AS AMICUS CURIAE.

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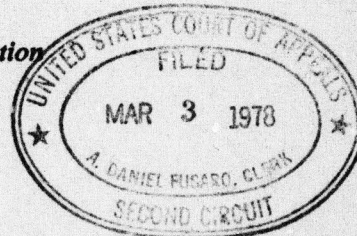


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INTEREST OF AMICUS

The American Federation of Teachers is an organization with more than 2,000 local unions with a total membership in excess of 450,000 teachers throughout the United States. It is affiliated with American Federation of Labor/Congress of Industrial Organizations. Among its accomplishments is to bring

to thousands of its members the benefits of collective bargaining agreements protecting terms and conditions of employment.

Among the membership of the American Federation of Teachers are many locals of college teachers, with thousands of members. These locals have and/or are committed to achieving certification as bargaining agent for the teacher they represented. The American Federation of Teachers is thus vitally interested in the issues raised in this legal proceeding.

By reason of its long history and association with labor, it is uniquely qualified to represent the view point of teachers who will be affected by the courts determination on the validity of the NLRB's asserted jurisdiction over Yeshiva University. We therefore respectfully address this court as Amicus Curiae on behalf of the Intervenor Yeshiva University Faculty Association.

ISSUES PRESENTED

1. Was the NLRB correct in holding that full-time faculty members were not supervisory or managerial employees?
2. Was the NLRB correct in including Division Chairpersons and Senior Faculty in the bargaining unit?

3. Was the NLRB correct in its determination that part-time faculty members should not be included in the bargaining unit?

4. Was the NLRB correct in its determination to include faculty members of the Academic Priorities and Resource Allocation and Faculty Review Committee in the bargaining unit?

STATEMENT OF THE CASE

This case is before the Court on application of the National Labor Relations Board (hereinafter NLRB), for enforcement of its order against Yeshiva University (hereinafter University) on August 24, 1977.

The proceedings in this matter were initiated by a petition filed on October 30, 1974 by the Yeshiva University Faculty Association (hereinafter Union) for a representative election in a unit of appointed full-time faculty members. The proposed unit consisted of all full-time faculty appointed to the University in the title of Professor, Associate Professor, Assistant Professor, or Instructor, with a full-time teaching load or equivalent, but excluded part-time faculty and a number of other specific categories not germane to this brief.

Hearings on the matter were conducted on 21 dates from November 26, 1974 to May 6, 1975. At the first hearing, the

entire record of prior representation proceedings consisting of nine days of hearings and numerous exhibits, was received into evidence and incorporated into the record of the instant case.

On December 5, 1975, the Board issued its decision and direction of election. Yeshiva Univ., 221 NLRB 1053. In its decision, the appropriate unit was described as:

All full-time faculty members appointed to the University in the titles of professor, instructor, associate professor, assistant professor, instructor, or adjunct or visiting thereof, department chairmen, division chairmen, senior faculty and assistant deans, but excluding faculty at Albert Einstein College of Medicine, Sue Golding Graduate School of Medical Sciences, Yeshiva High School, Rabbi Isaac Elchanan Theological Seminary, Cantorial Training Institute, Community Service Division, and Sephardic Community Activities Program; part-time faculty, lecturers; principal investigators; deans, acting deans and directors; faculty whose initial and subsequent appointment is in connection with special projects; the Registrar; visiting professors (with effective faculty appointments at other academic institutions); librarians; research assistants; research associates; emeritus faculty not actively engaged in teaching at the University; officers of the University; all other administrative and support personnel; guards, and supervisors as defined in the act.

An election was held between December 16 and 20, 1976. The Union won the election by a vote of 91 to 50 and was certified as the exclusive bargaining agent on December 29, 1976.

On February 2, 1977, the Union filed an unfair labor practice charging the University with a violation of Section

8(a)(5) and (1) of the National Labor Relations Act. The University raised a number of matters previously litigated before the NLRB as well as the allegation that the decision to exclude part-time faculty from the bargaining unit was improper without the NLRB first conducting a rule-making proceeding pursuant to the Administrative Procedure Act.

On April 12, 1977, the General Counsel for the NLRB moved for a summary judgment on behalf of the Union. On August 24, 1977, the Board granted the General Counsel's motion for summary judgment finding that the University had violated Section 8(a)(5) and (1) of the NLRA by its conduct. The University was ordered to bargain with the Union and to post the appropriate notices. The University's continued failure to bargain gave rise to the instant proceedings.

OVERVIEW OF AFT POSITION

The instant proceeding is a stark illustration of the state of complexity and the time-consuming nature of the current process of establishing a bargaining unit where an employer is determined to challenge the proceedings. The petition for an election and certification of a bargaining unit giving rise to this action was filed with the NLRB on October 30, 1974; it was not until December 16 and 20, 1976 that a vote on whether the

faculty wished to join the union was finally taken. Given the nature of the appellate process, additional years may go by before the employees involved finally have an opportunity to utilize their right to collectively negotiate with their employer.

The NLRB has held extensive proceedings and considered thousands of pages of exhibits and briefs in its deliberations in this matter. For purposes of brevity and in deference to the NLRB's careful consideration of the factual questions we will adopt their factual findings.

Our review of the factual findings and issues raised indicates that the questions presented are neither unique to Yeshiva nor questions of first impression. Because of their general application to institutions of higher education, we will be presenting the AFT's view on the following issues: appropriate standard for reviewing the NLRB's decision certifying the bargaining unit; the status of full-time faculty members as professional employees rather than supervisory or managerial employees; the inclusion of department chairpersons and senior faculty in the unit; the inclusion of faculty who are members of University committees in the unit; and the exclusion of part-time faculty from the unit.

ARGUMENT

- I. FULL TIME FACULTY MEMBERS ARE PROFESSIONAL EMPLOYEES PURSUANT TO SECTION 2(12) OF THE NLRA.

A. FULL TIME FACULTY MEMBERS ARE NEITHER SUPERVISORY NOR
MANAGERIAL EMPLOYEES.

A review of the voluminous record in the instant proceeding reveals that the threshold objection of the employer to the certification of a bargaining unit consisting of full-time faculty members is that under the traditional criteria utilized by the NLRB, full-time faculty are in fact supervisory and/or managerial employees.

In support of their contention, the University has argued that "the Board's underlying conception of the place of faculty in a university's management structure is erroneous, and that this erroneous conception, when followed by the imposition of faculty collective bargaining, would have potentially disastrous consequences for the structure of shared management that exists at our school." (University's post-hearing brief at page 50) This argument is based on the view that the University's decision-making is controlled by various committees made up of administrators, faculty and students. As we will show, these committees in reality serve only in an advisory capacity with the ultimate authority resting in the Board of Trustees and their appointed officers.

A short review of the Board's findings indicates that the full-time faculty does meet and make resolutions on a wide range of professional and institutional concerns. (A. 266-268, 414-418, 541-542, 545-546, 665-666, 810-811.) Faculty members also

serve on joint committees on subjects ranging from grading practices to faculty welfare. (A. 306-38, 438-439) The Faculty Welfare committees at several of the schools of the University have in fact negotiated with the University administration on behalf of the full-time faculty concerning such traditional collective bargaining subjects as salary scales. However in all of these activities, the faculty both individually and collectively represented the position of the faculty, not the overall position of the University administration.

The position of the institution is represented by the University's Board of Trustees through the University president and the Deans of the various schools. The ultimate authority for the operation of the University rests with the Board of Trustees. Its chief administrative officer, the University President, has the power to act on the University's behalf in overruling any of the recommendations made by the various committees which serve primarily in advisory capacities. Therefore the input made by these committee members represents the consensus of opinion of the faculty groups which they represent.

This input into the governance of the University does not give rise to the faculty assuming a true managerial and/or supervisory role but is consistent with the role of professional employees to present their views on matters of University operation

within their field of expertise. The expression of such opinions even if given weight by the University does not ipso facto confer on the professional employee managerial status under the NLRA. This fact was recognized by the Court of Appeals for the First Circuit in N.L.R.B. v. Wentworth Institute, 515 F.2d at 556, where the court stated "the trustees, who have ultimate authority, as a matter of course delegate to the faculty or its representatives varying amounts of authority and influence over educational policy and the governance of the institution." The Court held that such delegation did not give rise to managerial status.

The heart of the University's contention is directed at two factors which are clearly beyond the scope of the NLRB's discretion in establishing an appropriate bargaining unit.^{1/} The University's arguments are directed against to the policy of extending collective bargaining to professional employees because of their discretionary functions and the perceived problems associated with the imposition of an additional structure on the present matrix of decision-making entities at the University.

^{1/} The NLRB determination to take jurisdiction over an employer is based on the employers impact on inner state commerce. Once jurisdiction over the employer is asserted, the NLRB cannot make determinations that collective bargaining is inappropriate for some groups of employees unless they are with limited delineated exceptions, i.e. supervisors, management or confidential employees.

Since Congress has specifically provided coverage for professional employees, consideration of that policy decision should be more appropriately directed to Congress. In response to the argument that congressional intent in establishing statutory coverage for professional employees was to exclude employees at not-for-profit institutions such as educational institutions, one may cite Congress' recent action in eliminating the specific exemption from coverage granted to not-for-profit hospitals as a strong indication that the current NLRB interpretation which would include faculty members has the support of a Congressional majority.

The other group to which the University could have address arguments with regard to the appropriateness of establishing collective bargaining was the faculty. Apparently the faculty at Yeshiva viewed the establishment of collective bargaining as an appropriate means of communication with the University as witnessed by their vote of 90 to 50 for the Union.

An additional argument raised is that the NLRB has strained the traditional definition of supervisory and/or managerial personnel in order to assert jurisdiction over University faculty.

The NLRB has long defined "managerial" employees as "executive employees who formulate, determine and effectuate management policies", Ford Motor Co., 66 NLRB 1317, 1322 (1946),

or as those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer", Palace Landry Dry Cleaning, 75 NLRB 320, 323 N. 4 (1974). In General Dynamics, 213 NLRB at 857, the NLRB held that "managerial status...is reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management."

These principles in determining managerial status were applied to the educational field in Adelphi University, 195 NLRB 639 (1972), where the NLRB stated:

In this case...the ultimate authority does not rest with the peer group but rather with the board of trustees. Thus, although the facts indicate that much respect is paid by the trustees to the recommendations of the collegial body, it is equally clear that the trustees reserve the ultimate authority for themselves. It is also clear that the board of trustees, even if it had such power, has not attempted to convert the committees into managerial or supervisory entities. They are not advised to advocate management's interests in making their decisions, nor are they advised that they are management's representatives in making them. 195 NLRB at 648

This formulation of NLRB policy is clearly within its discretion with regard to managerial personnel and clearly applicable to the governance structure of the University.

In reviewing the University's argument that faculty members are supervisory employees it is appropriate to go first to the NLRA Section 2(11) which defines "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely routine or clerical in nature, but requires the use of independent judgment. (emphasis added)

The University would have the court read this definition in an extremely expansive manner requiring a finding of supervisory status if any of the powers enumerated are exercised. However the NLRB has consistently interpreted the language of 2(11) in light of the congressional mandate to provide collective bargaining to employees unless their duties for the employer include a substantial supervisory role. The NLRB's position is set forth in General Dynamics Corp., 87 LRRM at 1716:

While it is true that the authorities contained in Section 2(11) of the Act are indicative of supervisory authority, it does not necessarily follow that the exercise of one or more of these authorities ipso facto confers supervisory authority unless it is exercised in the genuine managerial sense. This also is clear from the legislative history of the Taft-Hartley Act of 1947 wherein the Conference Committee adopted the Senate version of the bill, S. 1126, which excluded supervisors, but with a narrower definition thereof than the House version, H.R. 3020, by distinguishing between "leadmen, set up men and other minor supervisory employees...and the supervisor vested with genuine management prerogatives as the right to hire or fire, discipline, or make effective recommendations with regard to such action." (citations omitted)

Applying the standards enunciated above to the faculty in the instant case it is apparent that the indicia of supervisory status are minimal. It is apparent that the faculty offers input into decision-making from the basis of professional expertise in the area of education rather than from a management perspective. The ultimate authority in hiring and granting tenure rests with the University President who can act independently of faculty recommendations. With regard to the ability to discipline employees or adjust grievances, it is clear that the faculty does not possess these supervisory duties. The NLRB determination that the faculty members are not supervisors is consistent with the NLRB tests which have been applied to professional employees in industry and not-for-profit organizations.

We would also note that NLRB factual determinations have been given "more than the usual weight" assigned to agency determinations, N.L.R.B. v. Stark, 525 F.2d 422, 431 (2nd Cir., 1975). In addition, the NLRB's determination that occasional performance of some supervisory tasks does not give rise to supervisory status has been approved in a number of cases. N.L.R.B. v. Dunkirk Motor Inn, Inc., 524 F.2d 663, 666 (2nd Cir., 1975); N.L.R.B. v. Doctors' Hospital of Modesto, 489 F.2d 772, 776 (9th Cir., 1976).

The employer is thus asking the court to overrule the NLRB's determinations of non-supervisory status which were based

on a well-established test. Regardless of the gloss given this argument by citations to examples in which faculty recommendations were followed, the University is in reality asking the court to substitute its judgment for the wisdom of a legislative policy made by Congress. Regardless of the dubious merits of the University's position on policy grounds, the court, if allowed to follow the University's directions, would exceed its jurisdiction by making a determination based on its own consideration of the merits of the policy argument. N.L.R.B. v. Wentworth, 515 F.2d 550 (1st Cir., 1973)

The court should give short shrift to the University's arguments on this point. The University is attempting to relitigate well established law. Its arguments below have been raised on numerous previous occasions with no success. The only practical effect of serious consideration of these questions is to encourage the University to continue to utilize court proceedings to delay and frustrate the legitimate collective bargaining agent in carrying out its statutory purpose of representing the faculty of the University in collective bargaining. These employees have already had their rights delayed for over three years. To permit further delay will only frustrate the purposes of the National Labor Relations Act by letting the University effectively deny its employees the right to bargain based on irrelevant arguments and procedural delay.

B. THE NLRB DETERMINATION TO TAKE JURISDICTION OVER COLLECTIVE BARGAINING IN NOT-FOR-PROFIT EDUCATIONAL INSTITUTIONS IS CONSISTENT WITH ITS CONGRESSIONAL MANDATE.

In 1970 the NLRB reversed its long standing position of refusing to take jurisdiction over private non profit educational institutions in Cornell University, 183 N.L.R.B. 41, 74 LRRM 1269 (1970). In its decision the NLRB noted that educational institutions had increasing impact on commerce by reason of the number of people employed and volume of business activities generated by the institutions. In addition, educational institutions have requested and received research grants and other monies from both governmental and private sources. In view of this increasing impact of education on the economy it was determined that there was no longer any viable rationale for withholding the protection of collective bargaining from this larger portion of the work force. Id., 74 LRRM at 1274. Subsequently, the NLRB established a monetary test for jurisdiction of \$1 million in gross revenue with an expenditure of at least \$50,000. NLRB: STATEMENT OF PROCEDURES AND REGULATIONS, SERIES A (AS AMENDED) 29 CFR§103.1 (1959).

The initial decision of the NLRB to assert jurisdiction in the context of an educational institution did not create a major stir possibly because the group of employees involved in the case were cafeteria workers and the employer would otherwise

have been required to hold an election under the auspices of the New York State Labor Relations Board. See K. Kahn, The NLRB and Higher Education: The Failure of Policymaking Through Adjudication, 21 U.C.L.A. 63 (1973) at 64-5.

Once the NLRB assumed jurisdiction over not-for-profit educational institutions the question of coverage of faculty came into focus. The NLRB in dealing with the issues presented in petitions by faculty for elections and certification of bargaining units quite properly drew upon its experience in the private sector. Fordham Univ., 193 N.L.R.B. No. 23 (1971); C. W. Post Center Long Island Univ., 189 N.L.R.B. 109 (1971).

The NLRB reasoning ran into a thicket of criticism in the legal literature. The most influential of these critiques by reason of its extensive scholarship, is K. Kahn, The NLRB and Higher Education: The Failure of Policy-making Through Adjudication, 21 U.C.L.A. L. Rev. 63. The criticism contained in this article has served as the basis of much of the argumentation in the University's brief. A glaring example would be the issue raised by the University that NLRB failed to hold rule-making proceedings prior to excluding part-time faculty from the unit as allegedly required by the Administrative Proceedings Act for first time during the unfair labor practice proceeding.

The position assumed by those who criticize the NLRB for providing coverage for faculty members is generally as follows:

1. The NLRB is applying concepts that it developed in dealing with "blue-collar" workers which are inapplicable to groups of professional employees such as college faculty;
2. The imposition of collective bargaining for faculty will destroy the unique joint-governance system which govern most institutions of higher education; and
3. The NLRB failed to engage in rule-making proceedings pursuant to the Administrative Procedure Act.

Initially, it should be pointed out that none of these arguments are relevant to a determination of whether the NLRB has jurisdiction over the University nor challenge the NLRB statutory mandate in making the determination of which employees cannot be afforded the protections contained in the Act.

The NLRA determines coverage by the types of employees subject to its jurisdiction. Once it assumes jurisdiction over an employer, the NLRB must follow the Congressional mandate in determining which employees are covered. Nothing raised in any of the criticisms does any more than suggest that collective bargaining for faculty may not be good public policy, an issue which is not before the court.

The initial argument that a procedure which has for the most part been utilized by "blue-collar" workers is necessarily not suitable for faculty simply does not square with either the history of collective bargaining or the statutory intent of Congress. Professional employees are specifically covered by the language of the Act. After reviewing decisions involving professional employees in the private sector, General Dynamics, 213 NLRB 851, (1974); Skidmore, Owens & Merrill, 192 NLRB 920 (1971), it is apparent that many of the unit determination questions involved there were every bit as difficult and complex as those presented in the present litigation.

In addition the faculty should have the right to make the determination of whether or not their best interests will be served by utilizing collective bargaining procedures. The University had a right to make its position known to its faculty in the long period between the original petition and the election. Apparently, this faculty saw that their best interests would be served by joining together to have an effective say in their wages and conditions of employment. They were impressed with the gains achieved by organized employees and felt that their current advisory role in decision-making was inadequate.

The long and satisfactory history of collective bargaining in the United States is proof of the validity of the NLRB model.

Permitting employees to bargain collectively has reduced rather than heightened the conflicts in labor relations and has led to a high standard of living for unionized employees. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 at 42. It is now incumbent upon the employer to establish a mature relationship with its employees rather than avoid its obligations. The continued failure of the University to deal with the problems giving rise to the faculty's decision to establish a collective bargaining relationship must be infinitely more harmful than the resolution of these problems in appropriate negotiations. The University has no obligation to concede to the demands made on it by its faculty. The faculty as professionals certainly can be entrusted with the same level of responsibility as blue-collar workers in determining what a responsible negotiating position would be. It would appear that the parties involved would be helped not hindered by the type of process engendered by collective bargaining.

The second issue raised presents problems on two levels. The first is whether a joint-governance model is an effective means of resolving the issues which the faculty would discuss in collective bargaining and the second is whether collective bargaining's effect on joint-governance would fatally injure the University. As the record shows the faculty at several of the schools engages in a modified form of negotiations and grievance adjustment. (See NLRB

brief at page 7) The certification of a collective bargaining agent would simply provide structure and continuity to that process.

At the University, the joint-governance committees serve an advisory role. They provide for dialogue between administration, faculty and students and formulate recommendations which can either be acted upon or set aside. These committees deal with many problems not directly involved with collective bargaining topics. We fail to see how the function carried out by these committees would be taken over exclusively by collective bargaining. In fact their policy-formulating function may be enhanced by permitting the faculty to deal with their employment concerns in another forum.

The objection raised to the NLRB's decision to proceed by adjudication rather than rule-making has already been held by the Supreme Court to be without legal merit. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 89 S.Ct. 1426, 22 L. Ed. 2d 709 (1969); see also NLRB v. Wentworth Institute, 515 F. 2d 550 (1975) at 556.

At this late date given the number of proceedings on the issues raised by the University, we fail to see any benefit to the imposition of a tardy rule-making proceeding. Adelphi University, 195 NLRB 639, (1972); C.W. Post Center of Long Island University, 189 NLRB 109 (1971). The NLRB has had ample opportunity to consider the arguments raised in prior adjudications. It has in fact reconsidered its position on a number of issues, i.e., the inclusion

of part-time faculty and the exclusion of department chairmen. New York University, 205 NLRB 4 (1973) While it might be argued that the NLRB could have avoided the necessity to reformulate policy by holding rule-making proceedings, it is equally likely that a review of the real world experience that has developed since its prior decisions was a determinative factor in the NLRB redetermination. At this point the NLRB has the benefit of five years of determinations and has developed consistent principles in most areas. There is no showing that any arguments on the part of the University have been precluded from consideration by reason of the lack of a rule-making proceeding.

A review of the above objections reveals that the reasoning involved is irrelevant to the question of whether the NLRB acted beyond its authority in determining that collective bargaining by faculty members is consistent with its statutory authorization. In fact most of these objections have failed to even present a convincing rationale to oppose bargaining on the basis of public policy.

II. THE NLRB CORRECTLY EXERCISED ITS DISCRETION BY INCLUDING DIVISION CHAIRMEN AND SENIOR FACULTY IN THE BARGAINING UNIT.

The most difficult problem faced by the NLRB in making determinations of appropriate bargaining units for faculties at higher educational institutions has been the question of the

inclusion of department chairmen or functional equivalent in a bargaining unit made up of faculty.^{2/} The NLRB has had extensive proceeding in attempting to determine appropriate standards for determining when they should be included in a particular unit. C. W. Post Center of Long Island Univ., 189 NLRB 109 (1971); Fordham Univ., 193 NLRB 23 (1971); Adelphi Univ., 195 NLRB 107 (1972); New York Univ., 205 NLRB 16 (1973)

Out of these proceedings the NLRB has developed a policy of inclusion of department chairmen unless they can clearly be shown to have supervisory attributes. New York Univ., 205 NLRB 16 (1973); Fordham Univ., 193 NLRB 23 (1971)

The reason for this policy is that at most institutions department chairman are representatives of the faculty viewpoint in discussion with the administration of the University. The department chairman is generally a full-time teacher who clearly views his interests as identical to those of his fellow teachers. In many departments the chairmanship is rotated among the full-time tenured faculty. The position is generally that of a group leader who acts on the basis of a consensus of his fellow faculty. The position is not viewed as a distinct vocational choice but as a responsibility assumed on behalf of fellow faculty.

^{2/} The Division Chairmen and Senior faculty discussed above are equivalent to department chairman at most institutions.

Even vehement critics of NLRB jurisdiction over higher education agree that the inclusion of department chairmen or their functional equivalent in a faculty bargaining unit is desirable from a policy and educational viewpoint. See K. Kahn, The NLRB and Higher Education: The Failure of Policy-making Through Adjudication, 21 UCLA L. Rev. 63 (1973) at 104-6 and 118

However in some institutions the position does have attributes traditionally associated with supervising status, i.e., right to hire part-time faculty or non-professional employees, assignment of course load or authority over salary increases. See. Adelphi Univ., 195 NLRB 107 (1972)

In situations where these attributes are present the NLRB has had to balance the identification of the department chairman as a full-time teacher and his "community of interests" with fellow faculty with the necessity of the employer that individuals making decisions on behalf of the employer not have divided loyalties. Thus in an institution where the department chairman were to spend a great deal of time in administrative details or make effective decisions on such items as salary increases, discipline, adjustment of grievances or assignment of work on behalf of the employer the NLRB would exclude the chairman from the unit as a supervisor because of the statutory language and conflict of loyalties inclusion would create.

A review of the record in the instant proceeding particularly the factual findings of the hearing officer clearly indicates that the division chairmen and senior faculty (hereinafter collectively referred to as division chairmen) at the University are viewed and treated by the administration as representatives of the faculty viewpoint and exercise no genuine supervisory duties in the interest of management and therefore their inclusion in the unit is sustainable without extensive resort to a discussion of the various tests established by the NLRB in situations where some degree of supervisory attributes are present.

The NLRB found that division chairmen are full-time teachers who receive no additional compensation for this service. They are paid and work on the same basis as all other faculty. In most cases they are chosen by their fellow faculty and present the decisions arrived at by their fellow faculty. Their input into the hiring process involves the making of recommendations which neither the Deans nor the President of the University are required to follow. (See NLRB brief at pages 30-38)

Division Chairmen are elected by their fellow faculty to serve as faculty representatives on various University committees. Some division chairmen and senior faculty are on the Faculty Welfare Committee which negotiates salaries and working conditions. They have also been active in presenting grievances on behalf of their

fellow faculty members.

They do not serve on the Executive Council and Budget Committees which are made up exclusively of University Officers and Deans. Thus their role in University governance is clearly that of faculty representatives.

A review of their authority indicated that they do not make faculty appointments; grant promotions; tenure; salary increases; change class assignments; discipline faculty; or adjust grievances on behalf of the University. All of which are traditional indications of supervisory status.

In the face of this evidence the University has argued at the hearings below that the University President and Deans have great respect for division chairmen and senior faculty recommendations and in many instances follow them. (Employer's post-hearing brief pages 58-62) That does not change the fact that the ultimate authority to act remains with the University President who can and does make independent investigations and as set forth above the division chairmen and senior faculty in most instances are transmitting a consensus arrived at by the faculty and acting on behalf of their fellow faculty. Much of what they do is analogous to the duties of a union representative.

Even if it were to be shown that the division chairmen did in fact possess some modicum of supervisory authority as set

forth in Section 2(11) of the National Labor Relations Act, such finding would not require their exclusion from the unit. As stated in NLRB v. Security Service Inc., 384 F. 2d 143 (5th Cir. 1967) at 148:

It has seemed to us that if a mere employee at some stage may become a supervisor, the transition becomes an actuality when he is found to possess real power 'in the interest of the employer' to take meaningful action with respect to the statutory tests. It is not alone that he may hire or fire or may offer discipline. He must do so in the interest of the employer. He must then, when acting, become in effect a part of management, not simply a lead man or straw boss. The entire work force from the president down to the messenger boy in one sense acts in the interest of the employer, as Congress well knew. Surely it contemplated some other test than is afforded by a sheer literal reading of Section 2(11).

Therefore the University needs to show more than the mere performance of one of the items enumerated in Section 2(11) in order to support an argument of supervisory status by division chairmen and senior faculty.

However our review of the record indicates that based on the factually finding of the NLRB indicates that inclusion of division chairmen is consistent with the statutory intent of Section 2(12) of the NLRA. There was a finding that no genuine supervisory authority was exercise. This factual finding made after extensive proceedings is entitled to considerable weight. Stop & Shop Companies, Inc., v. NLRB, 548 F. 2d 17, (1st Cir., 1977); NLRB v. Stark, 525 F.2d 422. Only where the NLRB has abused its considerable discretion can its determination in unit certification be set aside. Packard Motor Co. v. NLRB, 330 U.S. 485, 491

(1947). Since the findings are fully supportable by the record, they should be upheld.

III. PART TIME FACULTY AT YESHIVA UNIVERSITY DO NOT SHARE A COMMUNITY OF INTEREST WITH FULL TIME FACULTY AND THEREFORE WERE APPROPRIATELY EXCLUDED FROM THE UNIT.

The National Labor Relations Board made a determination based on the differences in compensation, participation in the University governance, eligibility for tenure, and working conditions between part time and full time faculty that no mutuality of interest existed which would require the inclusion of part time faculty in the bargaining unit created. (Brief of the NLRB at page 43)

It should be noted that the Union did not seek to include part time faculty in the bargaining unit. The test to be applied to the determination by the NLRB not to include part time faculty is not whether the most appropriate unit was selected but whether an appropriate unit consistent with some logical delineation has in fact established. See Wheeler-Van Label Company v. NLRB, 408 F.2d 613, at 617 (2nd Cir. 1969) Pursuant to the applicable criteria, the University would have to show that the unit it wishes to establish is the only appropriate unit. Banco Credito y Ahorro Ponceno v. NLRB, 390 F.2d 110,112 (1st Cir. 1968) cert. denied, 393 U.S. 832; Wheeler-Van Label Company v. NLRB, 408 F.2d 613, (2nd Cir. 1969) Not only does the University fail to meet its burden under these tests but it fails to present any substantial evidence in support of its position.

In the proceedings below the University argued that all part time faculty teaching six or more hours in the semester in which the election was held and who had taught at least six hours per semester in each of the preceeding three years should be included in the unit. The University's rationale for establishing this particular classification of part time faculty is unclear. The University failed to produce any evidence that this classification had any special significance within the University structure. The individuals included in the proposed category enjoy no special status within the University. There was no showing that faculty meeting these criteria would enjoy the normal attributes of full time service with regard to salary, fringe benefits or right to payment if their courses were not taught.

In fact they share no real community of interests either among themselves or with the full time faculty. They are an artificial construct whose only purpose is an attempt to come under criteria for inclusion set forth in New York Univ., 205 NLRB 4 (1973). A review of the New York University decision reveals that the term "regular half time" faculty as utilized in that case referred to a group of faculty at a dental clinic and was a distinct recognizable group within the faculty. The faculty at the dental clinic with its recognized role in the university is clearly distinguishable from the arbitrary grouping the University

presented for consideration. Clearly the University grouping represents no recognized or cognizable group of faculty with a community of interests which compels their inclusion in the bargaining unit.

The University raised for the first time in the Unfair Labor Practices proceeding subsequent to the election and certification of the Union the issue that the NLRB erred in its determination to exclude part time faculty without engaging in a rule making proceeding pursuant to the Administrative Procedures Act, 5 U.S.C., Sec. 551, et seq.

We would reject consideration of this issue because of the untimely manner in which it was raised. To request a new procedure unsupported by any modification in the established case law several years after the proceedings have been initiated is clearly improper. The University's conduct in resisting the summary judgment procedures to expedite processing its objection to certification of the Union indicates that the University is as interested in delaying the necessity of bargaining as it is in seeking a resolution of the dispute on its merits.

In addition the University's position is contrary to the Supreme Court holding in NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969) and reaffirmed in NLRB v. Wentworth Institute, 515 F.2d 550 (1975) at 556. The present proceeding is not the

appropriate forum to attempt to relitigate this settled point.

At this juncture we would note for the record that although the AFT fully supports the exclusion of part time faculty from the unit our position is not in reliance on the NLRB's test enunciated in New York Univ., 205 NLRB at 6-7. We feel the exclusion of all part time faculty "were not employed in a tenured track position" is unduly inflexible. There are many variables with regard to the make up of a particular faculty. Conceivably, a faculty which wishes to organize would be composed almost exclusively of part time faculty. In that event, exclusion of part time faculty would effectively preclude representation. We can also foresee circumstances where it would be appropriate to have a separate unit for part time faculty should they seek representation. This question need not be resolved in these proceedings since the Union does not wish to represent part time faculty as part of the unit and a substantial group of part time faculty members with a distinct community of interests does not exist.

IV. FACULTY MEMBERS ON THE ACADEMIC PRIORITIES AND RESOURCE ALLOCATION AND FACULTY REVIEW COMMITTEES ARE MEMBERS OF THESE COMMITTEES TO SERVE THE INTERESTS OF THE FACULTY RATHER THAN MANAGEMENT AND ARE THEREFORE APPROPRIATELY INCLUDED IN THE BARGAINING UNIT.

The University has argued that even if faculty of the university are not considered managerial or supervisory employees,

the faculty members elected to the Academic Priorities and Resource Allocation and Faculty Review Committees are in fact managerial and supervisory employees by virtue of their role in the governance of the school. The apparent graverman behind this objection to the inclusion of members of these committees as part of the bargaining unit appears to be a response to the criticism of faculty bargaining in several law review articles notably The NLRB and Higher Education; The Failure to Policy Making Through Adjudication, that permitting faculty members to engage in collective bargaining would destroy the unique system of self government which exists within the university. They argue that the system of checks and balances between the administration, faculty, and students that exists within the university governmental structure would be modified by the establishment of a separate bargaining agent for the faculty. Although this is a serious internal question for university and for faculty faced with the choice of selecting collective bargaining representative it does not bear directly on the issues involved in this proceeding. The exclusion of duly elected faculty representatives on these committees from the bargaining unit would do nothing to prevent the alleged distortion in the self governance that would occur with the selection of a collective bargaining agent.

A review of the committee structure indicates that

the faculty members are elected and/or selected by the faculty to represent its interest. These bodies have a right to make known the wishes of the constituencies and to make recommendation to the university president for action. The bodies themselves do not directly make policy or have any power to affectuate their determinations of appropriate policy. Such decisions as to the appropriate course of the university are left for the University president acting on behalf of the Board of Trustees.

The faculty representatives on these committees do not serve as independent administrative officers of the university but instead act as elected representatives on their own faculties in the representation of the faculty viewpoint and interests in the governance of the school. These committees do not have effective power to follow through with their recommendation in a management sense. It would thus appear for reasons stated above that the members of these committees are not in fact true managerial personnel. In the absence of true managerial and/or supervisory status there would be no realistic basis of separating these faculty members from the logical community of interest they share with the remainder of the faculty.

CONCLUSION

The case before the court presents a number of interesting and complex public policy considerations. However a review of the applicable standards set forth for reviewing NLRB determinations clearly demonstrates that no novel or difficult legal issues have been presented.

The NLRB has held extensive and exhaustive hearings in order to make the factual determinations upon which its unit determination rests. Its factual finding are supported by the weight of the evidence. After careful consideration it has applied its criteria for the establishment of a bargaining unit to its factual determination. As the brief above indicates the NLRB criteria for unit determination is based on tests which have been developed over a number of years and repeatedly upheld by the courts.

In the face of this carefully consideration, the University offered no argumentation which had not been considered previously by the NLRB. The decision of the NLRB is clearly supportable and should be affirmed unequivocally in order that a group of employees who have been waiting since 1974 for an opportunity to engage in collective bargaining may finally be granted their right. To do otherwise would only encourage other employers

to continually litigate settled unit determination and jurisdictional questions.

Respectfully submitted,

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STATE OF ILLINOIS, } ss. *M. Langbauer* being first duly
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and also filed the required number of copies of the above with the

U. S. Court of Appeals, Second Circuit

this 1st day of March 78 A. D. 19.....

M. Langbauer

Subscribed and sworn to before me this 1st

day of March A. D. 19..... 78

Rose Marie Kremake

Notary Public.